81-1026

Office - Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES U. RUPPERT,

Petitioner,

-VS-

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

HUGH D. HOLBROCK
TIMOTHY R. EVANS
315 South Monument Avenue
P. O. Box 687
Hamilton, Ohio 45011
Telephone: (513) 868-7600
Attorneys for Petitioner

The Petitioner, James U. Ruppert respectfully prays that a Writ of Certiorari issue to review the Opinion of the State of Ohio Twelfth District Court of Appeals from which Decision the Ohio Supreme Court refused to review on October 21, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. When a defendant is tried by a three-judge panel under a statute providing that only if the accused is charged with an offense puhishable by death will he be tried by three judges and the death penalty is later found to be unconstitutional, the defendant is only properly tried by the presiding judge, the one originally assigned to the case, and where that judge finds the defendant not guilty, he may not be retried.

I N D E X

QUESTIONS PRESENTED FOR REVIEW..... 1

STATEMENT OF JURISDICTION..... 4

CONSTITUTIONAL PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 5

STATEMENT OF FACTS..... 6

REASONS FOR GRANTING WRIT..... 7

1. This Court should grant a Writ of Certiorari to review this decision since the defendant who was originally tried by a three-judge panel was tried under a statute in the State of Ohio providing for a three-judge panel only when the death penalty could be imposed. Since the death penalty could not be imposed constitutionally in Ohio the defendant was improperly tried and the only person with authority to try the defendant was the presiding Judge, Fred Cramer, who found the defendant not guilty by reason of insanity. Therefore, to re-try the defendant now would violate his Fifth Amendment protection against double jeopardy under the United States Constitution..... 7

APPENDIX

Memorandum Decision and Judgment Entry, dated June 26, 1981..... App. 1

Appeal from the Court of Appeals.. App. 9

AUTHORITIES

Bell vs. Ohio, 438 US 637..... 9

Lockett vs. Ohio, 428 US 586..... 9

Ohio Revised Code 2945.06..... 8

State vs. Thomas, 61 OS 2d 254..... 7

Constitution of the United States of America, Amendment V..... 4

STATEMENT OF JURISDICTION

The Ohio Supreme Court declined to hear this matter on October 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States of America, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant, James U. Ruppert, was indicted in 1975 for the murder of eleven (11) members of his family, and this Court is no doubt familiar with the surroundings of this case having once heard it previously on appeal. James U. Ruppert was convicted by a majority, i.e., two out of three, of a Three-Judge Panel, Judge Fred Cramer finding the defendant not guilty, the other two Judges finding the defendant guilty.

The case was appealed on the grounds that a majority verdict was not constitutional and contrary to the law of Ohio and furthermore that James U. Ruppert had been advised that it would take all three judges to convict him and was yet convicted by a majority of the Judges. The Court of Appeals reversed the conviction on the basis that James U. Ruppert had been misinformed on his Jury Waiver, which decision was affirmed by the Ohio Supreme Court and certiorari was denied by the United States Supreme Court. A new trial was ordered for the defendant. The defendant filed a Motion To Acquit based upon the grounds that to re-try him would constitute double jeopardy. The case was argued before visiting Judge A. Ross Siverling who denied the Motion To

Acquit the defendant. The Ohio State Twelfth District Court of Appeals affirmed this decision and the Ohio Supreme Court refused to hear said case. It is now urged that this Court should grant a Writ of Certiorari.

STATEMENT OF FACTS

James U. Ruppert was convicted by two out of three of a Three-Judge Panel. Judge Fred B. Cramer presided at the trial and because the Jury Waiver was signed, a three-judge panel was selected, composing of Judge Cramer, the presiding Judge, Judge Marrs, and Judge Fiehrer. Judge Cramer acquitted the defendant; however Judge Marrs and Judge Fiehrer found the defendant guilty.

REASONS FOR GRANTING WRIT

1. This Court should grant a Writ of Certiorari to review this decision since the defendant who was originally tried by a three-judge panel was tried under a statute in the State of Ohio providing for a three-judge panel only when the death penalty could be imposed. Since the death penalty could not be imposed constitutionally in Ohio the defendant was improperly tried and the only person with authority to try the defendant was the presiding Judge, Fred Cramer, who found the defendant not guilty by reason of insanity. Therefore, to re-try the defendant now would violate his Fifth Amendment protection against double jeopardy under the United States Constitution.

The defendant has appealed from the denial of the motion to Acquit on the grounds of double jeopardy. There can be no doubt that even though the defendant has not gone to trial yet for the second time, such an order is immediately appealable. In the case of State vs. Thomas, 61 OS 2d 254, the Supreme Court of Ohio held:

> "The overruling of a Motion to Dismiss on the grounds of double jeopardy is a final appealable order..."

The Court reasoned that it not only protects the accused from multiple prosecutions for the same offense, but it also protects the defendant from having to stand trial a second time, even if he is not punished. Therefore, there is no doubt that the order is immediately appealable. The question then is has James Ruppert been placed in double jeopardy. There are two propositions of law which are such plain law that no citations are needed. The first is that where the defendant appeals a conviction and obtains a reversal, he is not placed in double jeopardy by a subsequent trial. The second is likewise that where a defendant has been acquitted on a previous trial, he may not be retried. Thus the question becomes has James Ruppert been acquitted?

As the Court will remember, James Ruppert was convicted by two out of three of a three judge panel with the presiding Judge, the Judge to whom the case was originally assigned having found James Ruppert not guilty by reason of insanity. James Ruppert was tried by a three Judge panel by virtue of Ohio Revised Code 2945.06 which provides

that if the accused waives a jury if he is charged with an offense punishable by death, he will be tried by three judges, the three judges consisting of the presiding judge and two others appointed by the presiding judge. However, James Ruppert was not charged with aggravated murder with specifications for which the death penalty was available at the time. However, the United States Supreme Court, in Bell vs. Ohio 438 US 637, and Lockett vs. Ohio, 438 US 586, held that the death penalty was unconstitutional and that no one could be sentenced to death under that statute.

Thus, since James Ruppert was not charged with an offense punishable by death, he could not legally be tried by a three-judge panel, and Judge Cramer then had no authority to appoint a three-judge panel. If a Statute is unconstitutional it is void from its inception, and since the death penalty was unconstitutional, then it was void. Thus, the two judges who sat with Judge Cramer were mere surplusage and the only Judge who was properly sitting in the case, Fred

B. Cramer, found the defendant Not Guilty by reason of insanity. His decision was the only valid judgment and therefore the defendant has in effect been acquitted of the charge and been found Not Guilty by reason of insanity and therefore the State's attempt to try him is double jeopardy and the defendant should have been dismissed.

CONCLUSION

Therefore, petitioner James Ruppert submits to this Court that he has been acquitted of the charge and it was error for the Courts to refuse to grant his Motion To Acquit and Motion to Dismiss the defendant and the State is barred from re-trying him a second time and that this Court should grant Certiorari to determine this question.

Respectfully Submitted,

HOLBROCK, JONSON, BRESSLER & HOUSER
315 South Monument
P. O. Box 687
Hamilton, Ohio 45012
Telephone: (513) 868-7600

By_____
Hugh D. Holbrock

and

By_____
Timothy R. Evans

APPENDIX

Filed in the Court of Appeals
Butler County, Ohio
June 26, 1981
Edward S. Robb, Jr.
Clerk

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

STATE OF OHIO, * Case No. CA80-04-0037
Plaintiff-Appellee
vs. * MEMORANDUM DECISION
JAMES U. RUPPERT * AND
JUDGMENT ENTRY
Defendant-Appellant 6-26-81
*
* * * * * * * * * * * *

John F. Holcomb, Butler County Prosecutor, Butler county Courthouse, Hamilton, OH 45011
Counsel for Plaintiff-Appellee

H. J. Bressler, Hugh D. Holbrock, Timothy R. Evans, Holbrock, Jonson, Bressler & Houser, 315 So. Monument Avenue, Hamilton, OH 45011

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries, original papers, transcript of the proceedings from the Court of Common Pleas

of Butler County, Ohio, and the brief and arguments of counsel.

Now, therefore, the assignment of error having been fully considered, is accordingly passed upon in conformity with App. R. (12) A as follows:

Defendant-appellant, James U. Ruppert, was indicted on April 4, 1975, for aggravated murder with specifications, in violation of R. C. 2903.01 (A) and 2929.04 (A) (5). He is alleged to have murdered his mother, brother, sister-in-law, and their eight children. To the indictments, pleas of not guilty and not guilty by reason of insanity were entered in his behalf. Preliminarily, he was found competent to stand trial. A written jury waiver was signed by appellant and entered into the court records; the waiver included a consent to be tried by three judges of the Common Pleas Court of Butler County, Ohio. Judge Cramer signed an Entry relative to that panel, to wit:

> The defendant herein having duly, and in accordance with law, waived his right to a trial by jury in this cause and having elected to be tried by a panel of three judges, I, as Presiding Judge of the Court of Common Pleas of Butler County, Ohio, do designate Arthur J. Fiehrer, Robert L. Marrs and myself as the three judges constituting said panel.

Nowhere does the record indicate that the cause had been assigned to Judge Cramer; the Entry merely acknowledges that Judge Cramer was the Presiding Judge and that, as such, the statutory duty to form the panel fell upon him.

Following the trial to the three-judge panel, Judge Fiehrer and Judge Marrs signed a majority verdict indicating that the state had proved beyond a reasonable doubt that appellant was guilty of aggravated murder, and that he was sane at the time of the commission of the offenses. Judge Cramer did not agree and would have found him not guilty by reason of insanity.

Appellant thereafter filed a Motion For a New Trial stating as one of the grounds that the jury waiver was not knowingly, intelligently, and voluntarily given because it was given upon the invalid premise that the verdict was required to be unanimous. The motion was overruled in the Common Pleas court, and appellant was sentenced to eleven consecutive life terms. Since the verdict of the panel was not unanimous, the death penalty was not imposed.

Notice of appeal was timely filed, and in due course, the appeal was

heard and decided in the First District Court of Appeals wherein the judgment was reversed. State vs. Ruppert No. CA75-08-0067 (1st Dist. August 3, 1978). The Ohio Supreme Court affirmed the court of appeals. State vs. Ruppert (1978), 54 Ohio St. 2d 263, 375 N.E. 2d 1250. The United States Supreme Court denied certiorari. The reversal was based upon invalidity of the jury waiver. At the same time, the appellate court, pursuant to another assignment of error, held that the judgment and conviction were not against the manifest weight of the evidence.

A new trial was ordered for Mr. Ruppert. A motion for change of venue was granted, and this cause is currently docketed in Hancock County, Findlay, Ohio, for trial, pending the outcome of this appeal.

The instant appeal was taken from the trial court's denial of appellant's motion for acquittal based upon a claim of double jeopardy. His single proposition of law is stated as follows:

> The Court erred in overruling the Defendant's Motion for Acquittal

for the reason that the Defendant has been found Not Guilty in a previous trial and therefore could not be retried.

The overruling of a Motion to Dismiss on the grounds of double jeopardy is a final appealable order. State v. Thomas (1980), 61 Ohio St. 2d 254, 400 N. E. 2d 897.

Appellant asserts that Judge Cramer was the only judge before whom appellant was validly tried. His claim is that Judge Cramer, as presiding judge, was the judge to whom the case was originally assigned. The record does not support that contention. Judge Cramer, as presiding judge, was following the dictates of R. C. 2945.06 in assembling a panel, and that is reflected in his Entry. His decision carried no more weight than did the decision of the other two judges. The fact is, appellant was improperly tried by the three-judge panel because there was no valid jury waiver. Surely, if one of the other two judges who found appellant guilty had been presiding judge at that time, appellant would not now attempt to argue that his decision was binding. No one person's decision carried more weight than the others. R. C. 2945.06 contemplates a majority vote. State vs.

Ruppert (1978), 54 Ohio St. 2d 263, 375 N. E. 2d 1250. Therefore, the only decision was the collective one.

The jurisdictional provisions of R. C. 2945.06 have never been repealed and remain valid. Although Lockett vs. Ohio (1978), 438 U.S. 586, 98 S. Ct. 2954 and Bell vs. Ohio (1978), 438 U.S. 637, 98 S. CT. 2977 held that Ohio's death penalty statutes were unconstitutional, those decisions only invalidated the portion of the judgment pertaining to the death penalty. Although those cases would void the portions of those statutes relative to imposition of the death penalty itself, as a penalty, it had no effect upon the remainder of this statute. Use of the three-judge panel has been upheld as constitutional. State vs. Cotton (1978), 56 Ohio St. 2d 8, 381 N. E. 2d 190.

However adeptly appellant attempts to obfuscate the issue, the essential element presented is whether there may be a retrial following reversal of a conviction on appeal. There is only one instance in which conviction will prevent a retrial; when a conviction is reversed on the weight or sufficiency of evidence, the

defendant must be discharged. Burks v. United States (1978), 437 U.S.1, 98 S. Ct. 2141

When a criminal's trial has been reversed in the Court of Appeals because of an invalid jury waiver, a retrial does not conflict with the constitutional rule against double jeopardy. Beatty v. Alston (1975), 43 Ohio St. 2d 126, 330 N.E. 2d 921; cert. denied 423 U.S. 1000, 96 S. Ct. 432; Foran v. Maxwell (1962), 1973 Ohio St.561, 184 N. E. 2d 398; Crim. R. 33(D).

Appellant's assignment of error is accordingly not well taken.

The assignment of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed, and remanded for further proceedings according to law.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

CASTLE, P.J., HENDRICKSON, KOEHLER, JJ.

To the Clerk:

Enter upon the journal of the Court, per Order of the Court.

By_____
Presiding Judge

THE SUPREME COURT OF OHIO

1981 Term

THE STATE OF OHIO, To wit: October 21, 1981

City of Columbus,

State of Ohio,
Appellee,
vs.
James U. Ruppert, No. 81-1513
Appellant APPEAL FROM THE COURT OF APPEALS
for Butler County

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists hereon.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that

the foregoing entry was correctly copied
from the Journal of this Court.

Witness my hand and the seal of the Court
this _____day of _____19____

_____Clerk

_____Deputy